No. 12,394

IN THE

United States Court of Appeals

For the Ninth Circuit

MYRTLE CANON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S REPLY BRIEF.

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THE FACTS.

The findings of the trial Court set forth the facts in this case and as these are amply substantiated by the evidence and are not controverted on this appeal except as to findings that the employees of the Government (p. 4 of App. Brief) were not acting within the course and scope of their employment, we set forth these findings as the facts of the case with the exception of all findings relative to acting within the course and scope of their employment, which are eliminated. Therefore we present the following as the facts of this case:

That plaintiff was a civilian medical secretary employed by the United States at the De Witt General Hospital at Auburn, California, a hospital operated by the Medical Department of the War Department of the United States.

On June 14, 1945, plaintiff was operated upon in said hospital for varicose veins in her legs, a disease or ailment with which she had been afflicted for some time and which was in no way caused or contributed to by her employment. The operation was performed by Dr. E. William Rector, with the permission of Colonel William Smith, Commanding Officer of said hospital. Plaintiff received post-operative treatment from both Dr. E. William Rector and Dr. Norman Freeman, chief of the vascular section of said hospital.

Subsequent to said operation an infection appeared at the site of the operative wound. A course of treatment consisting of medication, irrigation of the infected area, and a series of operations, was instituted by the attending doctors in an attempt to arrest and cure the infection. In spite of such course of treatment the infection continued to spread and developed into a phagedenic ulcer, a rare and unusual disease. This ulcer continued to spread over the plaintiff's body during the entire time she remained under treatment at De Witt General Hospital until about November 24, 1945, at which time she was discharged from said hospital by reason of the fact that it was being deactivated by the Medical Department of the

United States Army, and thereafter while she was successively a patient at the University of California Hospital in San Francisco, California, the San Francisco City and County Hospital, and two hospitals in Los Angeles, California. At the time of trial herein, the said ulcer was not yet completely healed.

The course of treatment given to the plaintiff after the appearance of the infection was the usual, ordinary and recognized treatment customarily given by physicians and surgeons practicing medicine in the State of California at that time in similar cases of post-operative infections. The same course of treatment has been continued by plaintiff's present attending physician up to the time of the trial of this action.

During the time she remained in De Witt General Hospital subsequent to the operation performed upon her on June 14, 1945, plaintiff was afforded the usual and ordinary care and attention customarily afforded to patients in her physical condition by hospitals operated at that time in the State of California, and by doctors, nurses and attendants employed therein.

During the time she was under treatment at the De Witt General Hospital subsequent to said operation, plaintiff on numerous occasions handled the dressings applied to the site of the ulcer, and on several occasions touched and scratched the infected body areas and removed the bandages placed thereon.

The operation performed upon plaintiff on June 14, 1945, and all of the subsequent operations performed

upon her at the De Witt General Hospital were performed by the attending doctors in accordance with accepted and general recognized techniques, and with the degree of care, skill and learning usually and ordinarily employed by surgeons practicing at that time in the State of California.

On June 14, 1945, and at all times subsequent thereto while plaintiff remained in the De Witt General Hospital, the said hospital was operated by the Medical Department of the War Department of the United States under army regulations promulgated by the Secretary of War through the Chief of Staff, United States Army, including Army Regulations No. 40-590.

All of the employees of the United States of America who participated in any degree in the operations upon, hospitalization of, care of, or treatment of plaintiff, at all times exercised at least ordinary care and employed at least ordinary skill and learning in performing said operations, and in providing said hospitalization, care and treatment to plaintiff, and were not guilty of negligence, wrongful act or omission.

THE QUESTION.

The substantial questions presented by the appellant are:

If the acts of the Government employee constitute negligence (the trial Court found they did not) were these acts in the course and scope of his employment?

Did the trial Court err in finding, among others, that the acts were not in the course and scope of the employee's employment?

THE LAW.

As only one question is raised, and this Court is only called upon to interpret the law on the sole question of the course and scope of employment, we briefly review the law relative thereto.

Basically, the appellant was required to establish primary facts in order to give this Court jurisdiction, to-wit:

(a) That the persons who caused the injuries were employees of the United States at the time of the accident.

(b) That he was acting within the course and scope of his employment in the performance of the acts complained of.

(c) That the employee was not acting in a discretionary function or duty.

As stated in

Hubsch v. U.S., 174 Fed. (2d) 7:

> "We must reject the contention that judgment can be fastened upon the United States under the Federal Tort Claims Act solely because a servant of the Government negligently drove a vehicle belonging to the Government which had theretofore been entrusted to such servant, with-

out regard to whether such servant was acting within the scope of his duty. We come to this conclusion even though the statute undertakes to put the Government in the same situation as a private person would be under the law of the place where the accident occurred. It must be kept in mind, however, that statutes waiving the immunity of the sovereign to be sued must be strictly applied. Rambo v. United States, 145 F. 2d 670, and U.S. v. Durrance (5 Cir.), 101 F. 2d 109, wherein it was stated:

'An action against the United States may be maintained only by its permission, and a statute dealing with the relaxation of sovereign immunity from suit must be strictly construed. Governmental liability should not be extended beyond the plain language of a statute authorizing it. Schillinger v. United States, 155 U.S. 163, 15 S. Ct. 85, 39 L. Ed. 108; Price v. United States, 174 U.S. 373, 19 S. Ct. 765, 43 L. Ed. 1011; United States v. Michel, 282 U.S. 656, 51 S. Ct. 284, 75 L. Ed. 598; Munro v. United States, 303 U.S. 36, 41, 58 S. Ct. 421, 82 L. Ed. 633.'

"It must also be noted that the Tort Claims Act confers jurisdiction upon the Court to hear claims against the United States 'on account of damage * * * caused by the negligent or wrongful act or omission of an employee of the Government *while acting within the scope of his office or employment* * * *.' (Emphasis added). There can, therefore, be no jurisdiction in the Court to hear and determine claims against the Government under the Federal Tort Claims Act for any injury caused by the negligence of an employee

who was not acting within the scope of his employment. That is to say, the Government has not consented to be sued or to be liable for injuries caused by the negligent acts of its employees who are in and about their own personal and private enterprises. The Court would have no jurisdiction to try a tort action against the United States which was not based upon acts within the scope of the employment or duty of a servant. Cropper v. U.S., 81 F. Supp. 81; Long v. U.S., 78 F. Supp. 35; Rutherford v. U.S., 73 F. Supp. 867."

* * * * * * *

"There being no competent evidence in this case that the driver of the jeep was on the occasion in question in and about the business of the Government, and also no applicable presumption to that effect, it necessarily follows that the cases of the plaintiffs must fall and the judgments of the lower Court should be, and the same are hereby, AFFIRMED."

We admit (a) that the persons allegedly causing the injuries were employees of the United States, but deny (b) in this case.

We do not desire to repeat the clear and logical memorandum opinion of the learned trial Court, as the Court will read it, but we will try and limit our brief to an extenuation of that opinion.

Perhaps we should point out that the trial Court in its opinion, through inadvertence or stenographic error, the name of Col. Smith was used on pages 2, 4 and 5. This should have been Colonel Stark, and

Colonel Stark, who was only the head of a section, not the commanding officer, stated according to appellant's testimony, that the hospital would perform the operation for her. (R.T. 47.) However, as stated by the trial Court in its opinion, A. R. 40-590 defines or classifies persons who are entitled to receive treatment in Army Hospitals, as follows:

"6. Persons who may be admitted to Army hospitals (provisions of this paragraph do not apply to the Army and Navy General Hospital (see AR 40-600)—When suitable facilities for hospitalization are available, sick and injured persons enumerated below may be admitted to Army hospitals.

a. The following personnel of the Army:

(1) Officers, male and female (active or retired) (including Philippine Scouts).

(2) Warrant officers, male and female (active or retired) (including Philippine Scouts).

(3) Flight officers.

(4) Army nurses (active or retired).

(5) Cadets of the United States Military Academy.

(6) Militarized female personnel of the Medical Department.

(7) Aviation cadets.

(8) Contract surgeons serving full time.

(9) Enlisted men and women (including Philippine Scouts).

(10) Retired enlisted men."

It is clear that appellant doesn't come within any of the above classifications. Therefore she was not entitled to, nor could appellant be admitted as a patient under the law. Army Regulations have the same force and effect as law in such cases. See

Hironimus v. Durant, 168 Fed. (2d) 288;
Gratiot v. U.S., 45 U.S. 80;
Ex parte Reed, 100 U.S. 13.

If she could not be admitted as a patient under the law, it must follow that the acts of any employees of the Government were not within the scope of their employment. They were not hired to treat people who were there illegally or through the goodness or caprice of the person in charge, or a person in charge of a small sector of the hospital, as in this case. If this was so, carried logically to its conclusion, the Army hospitals would be obligated to treat anyone who as an employee of such hospital desired to be treated, or who thought they should be treated.

We agree with appellant that the law of the place where the act occurred governed, but only in the light of the Tort Claims Act itself and the interpretation placed on that Act by the Federal Courts, and that a Federal Court's decision on that subject takes precedence over a State Court decision. It is still a Federal law. Government liability should not extend beyond the plain language of a statute authorizing it, and being a relaxation of sovereign immunity, should be strictly construed. It is conceded, we think, that the Court does not have jurisdiction to try a

Tort action against the United States which is not based upon acts within the scope of his employment.

In

U.S. v. Evelyn Campbell (U.S.C. of A.—5th Circuit No. 12368, decided 2/11/48), ... Fed. (2d) ....., *citation not available,*

plaintiff filed a tort action against the Government alleging she was knocked down by a sailor running to catch a troop train and permanently injured. She alleges the sailor was "acting in line of duty". The Court denied the claim, stating:

> "The whole structure and content of the Federal Tort Claims Act makes it crystal clear * * * Congress was undertaking with the greatest precision to measure and limit the liability of the Government * * *. The very heart and substance of the Act is to be found in the words 'scope of his office or employment'."

There is no evidence that it was within the scope of the Government employees to care for appellant nor any evidence of wrongful act or omission within the scope of their employment. On the contrary, the evidence shows that such alleged acts were outside of their employment. The Government did not derive any benefit. On the contrary, appellant used a bed which was apparently needed and at the expense of the Government. In

Curio v. Nelson Display Co., 19 C.A. (2d) 46, 64 Pac. (2d) 1158,

it is held that if the agent's acts are not for the benefit of the employee, or connected in any way with the

purpose thereof, but are for the employee's personal benefits, his acts are not within the scope of his employment. In

Westberg v. Willde, 14 Cal. App. (2d) 360, 94 Pac. (2d) 590,

the Court stated:

"The pursuit of the master's business continued to be the controlling purpose".

We do not find in the record any permission of the commanding officer to hospitalize appellant nor any permission given to the employees, nor could any permission be implied or follow from the Army Regulations on the scope of employment of Lt. Col. Stark.

Appellant apparently concedes (p. 7 of brief) that the act must be done "in furtherance of the purpose of the employment"; that Lt. Col. Stark, the head of a section of the Army Hospital (not the head or the commanding officer, of the hospital—Colonel Smith), said "* * * it would be my (appellant) responsibility to see that the section ran smoothly until Major Freeman got his feet on the ground * * *" (p. 46); that when appellant mentioned she wanted to have an operation for varicose veins, Lt. Col. Stark told her "* * * we will do it here for you * * *" (p. 47); that "Major Freeman came in and I worked with him for about six weeks and then he left and took a month leave" (p. 49).

The commanding officer in the Army is the sole person responsible for the Unit. He alone could determine whether or not his retention was for the pur-

pose of the Government but he did not do so. Appellant knew this (p. 48) or certainly should have known. She knew, or certainly should have known, that she had no right to be operated on in an Army Hospital; that the hospital was for Army personnel only; that she was, as far as the Government was concerned, a trespasser. She knew she was not obligated to pay for the operation. It would be stretching the imagination to say that it furthered the Government purpose to have her operated upon. Even if Lt. Col. Stark considered her operation desirable or necessary until Major Freeman "had his feet under him", that was accomplished before he left for his vacation. Violation of the Federal law cannot be said to be "furthering the purposes" of the Government.

Appellant cited

Stansell v. Safeway Stores, Inc., 44 C.A. (2d) 822,

an Appellate Court decision. However, we do not think the facts are in point in this case. A somewhat similar case to the one cited, but a Supreme Court case, is

Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 590,

which would seem more in point, if at all, than the case cited.

It was not Lt. Col. Stark's job with the Government to hire personnel, nor to admit them to the hospital. If he did so, he departed from the scope of his employment.

Appellant seeks to draw a distinction between authority and scope of employment. We think the line

of demarcation is arbitrary on her part. How could the scope of employment be separated from authority? The authorized acts determine the scope of employment. One cannot disregard authority and say it is in the scope of employment. No cases to that effect were cited by appellant. The *Stansell* case holds, as we interpret it, that the wrongful act *must* be a part of the transaction of the authorized business. But here it was not a part. Lt. Col. Stark was not engaged in the work of the Government, for which he was hired, when he permitted an unauthorized person to be hospitalized. The nature of the act, the historical interpretation of the intent of Congress, the strictness of such interpretation when it relinquishes the right of a sovereign, all tend to the conclusion that only such acts are within the scope of employment, as against the Government, when the employee is authorized or actually acting within his prescribed authority. This is illustrated by the fact that estoppel does not lie against the Government. We will further follow this under our next heading.

As to (c):

> "Sec. 421. The provision of this title shall not apply to (a) any claim based upon an act or omission of an employee of the Government * * * based upon the exercise or performance * * * of a discretionary function or duty * * *".

Here again the law must be interpreted according to the intent of Congress and not solely guided by the law of California. It is obvious that Congress did not intend that the employees would go out of

their scope of employment, as delineated and definitely *laid down by proper authority,* and even went so far as to say that even under such proper authority, if *it is discretionary* with the employee (as against a direct command or direction to do a certain thing), it is an exception to the Tort Claims Act. So, looking at it in the best light for plaintiff we find—

The employee in this case had no authority to admit appellant. (This is, we believe, admitted.) At the best, it was a discretionary function. But the Government is not liable for any discretionary functions of its agents. In

Denny v. U.S., 171 Fed. (2d) 365,

the Court held medical treatment proffered to dependents of military personnel was a discretionary function of a commanding officer and the Government could not be held liable.

Under the Army Regulations, dependents could be treated at Army Hospitals, hence this is a much stronger case in favor of the Government than the case at bar, for surely if the Government is not liable when it is discretionary, it is not liable when forbidden.

THREE OTHER POINTS.

1. May we point out that the Government is not liable even if we are wrong in all or any one of the above. The appellant was bound to show negligence on the part of the officers or agents in the selection

of the surgeon to perform the operation. This is the rule applicable to employers who voluntarily furnish needed attendance to their employees.

Vesel v. Jardine, 127 A.L.R. 1092, 100 Pac. (2d) 75.

This was not done.

2. The appellant being a federal employee, her exclusive remedy is in The Federal Employees' Compensation Act.

See

Parr v. U.S. (1/21/49, 10 C.A.), 172 Fed. (2d) 462;

Jefferson v. U.S., 77 F. Supp. 706;

Hokensen v. U.S. (N.D. of C.). Judgment in favor of deft. entered April 19, 1949;

Dahn v. Davis, 258 U.S. 421.

Since the decisions in these cases the law has been amended to make the Act exclusive.

3. If the trial Court erred in its particular finding that the acts were not in the *course* and *scope* of the employee, then the other findings of a total lack of negligence must still stand and the judgment would still stand against the appellant.

APPELLANT'S BRIEF.

Appellant's brief, although displaying great ability in "building" a case, however disregards, we believe, certain fundamental matters.

(1) The appellant had put in her entire case. The trial Court dismissed the action in accordance with the findings of fact and conclusions of law and not solely on grounds of scope of employment.

(2) The disregard of certain principles of law inherent in a federal statute which are not voided by the Act or because of the phrase "law of the place where the act occurred".

As Chief Justice Vinson, in the *Aetna Casualty & Surety Co.* case, cited by appellant, said:

> "* * * neither the terms of the Act nor its legislative history preclude the application of R.S. 3477 in this situation".

Some of these principles are:

Individuals as well as Courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity and the rule "ignorance of the law furnishes no excuse for a wrongful act" applies in this case.

State v. Hayes, 52 Mo. 578;
Delafield v. State, 26 Wend. 238;
People v. Bank, 24 Id. 431;
Mayor v. Reynolds, 20 Md. 10.

The Government can function only through the acts of its agents acting *within the limits* of their lawful authority.

Floyd's Acceptance, 7 Wall. 666.

Were the rule otherwise, there would be no limit to the obligations which might be imposed upon the Government from the unauthorized acts of employees

purporting to act according to their concepts of what might be generally in the public interest, or otherwise. Estoppel does not lie against the Government.

Wilbur, etc. v. U.S., 294 U.S. 120, 123.

Those dealing with the agents of the United States are held to have notice of the limitation of their authority.

Utah, etc. v. U.S., 243 U.S. 389, 409;
Sutton v. U.S., 256 U.S. 575, 579;
Oregon v. U.S., 238 U.S. 393.

The intent of Congress in passing this Act: one of the principal reasons, as stated by appellant on page 10, was to relieve Congress of passing on private bills which heretofore had rarely exceeded $5000.

(3) Appellant states (p. 6), "These doctors and nurses were doing precisely what they had been hired to do." In treating appellant they were doing precisely what they *were not* hired to do. They were hired solely to take care of Army personnel except civilian employees compensable by the United States Employees' Compensation Commission "who suffered personal injury *while in the performance of official duty*". (Italics ours.) Appellant cites this on page 16 of her brief but there are two things which remove this citation from this case (a) "compensable by the United States Employees' Compensation Commission" (b) "in the performance of official duty." Clearly neither of these has been proved as a fact.

Appellant further cites Sec. 77.2 of Title 10, Code of Federal Regulations (p. 17) as showing that ap-

pellant's admission was authorized. This does not appear in Army Regulations, by which the Army personnel is governed. Moreover, from the partial citation itself, it is apparent that it is discretionary at the most, and hence excepted to by the Act.

Appellant further says the decision is placed with the commanding officer; that Col. Smith found appellant qualified for admission and that the District Court can not substitute its findings for those of the Commanding Officer. The answer is, that only within the Army Regulations is the decision of the commanding officer placed; we couldn't find in the record that Col. Smith, the Commanding Officer, had found, qualified or admitted her; that the Court is the proper forum to determine such alleged disputes as in this case. This is not an executive decision such as is referred to in the cases cited by appellant.

(4) The authorities cited do not refer to the Federal Tort Claims Act and reference to such cases should be guarded (see supra). The Restatement of Agency is not regarded as authority under the Act in question. To permit an employee who is unauthorized, to bind the United States, would open a field of liabilities that, carried out to its extreme, could bankrupt the United States and certainly was not the intent of Congress. The *Aetna Insurance Co. v. U.S.* case, cited on p. 10, we believe, simply stated that assignments by operation of law could be sued upon. It still retained the old law relative to other assignees being incapable of obtaining jurisdiction

under the old law (1875?). It illustrates that other federal laws should be taken into consideration.

(5) Referring to p. 13 of appellant's brief. The trial Court found it was not within the scope of authority and that there was no negligence. Appellant quotes *Sessions v. Southern Pacific,* 159 Cal. 599 (p. 13), and says this was the Tort rules which had been discarded and it is now superseded by the rule in *Oesttinger v. Stewart,* 24 Cal. (2d) 133. We could not find the *Sessions* case overruled or the rule distinguished by any subsequent cases. The following quotation from the syllabus of that case may interest the Court as appellant is, in our opinion, a trespasser.

> "Id.—Collusive Arrangement for Passage with Conductor—Notice of Want of Conductor's Authority.—A person riding on a train without payment of fare, in pursuance and with knowledge of an arrangement made between the conductors thereof, whereby he was given an expired pass running to one of the conductors which he was to present to the conductor in charge of the train, who was to punch and return it as if it were a ticket, is charged with notice, as a reasonable man, that it was contrary to the rules of the railroad company to allow him free passage. The status of a person so riding is that of a trespasser and not that of a passenger, and the company is not liable for causing his death unless it has been guilty of willful or wanton injury."

We believe the distinction between the *Oesttinger* case and this case is so marked that it requires no comment from us.

CONCLUSION.

This case was fully and fairly tried. Appellant had her day in Court and submitted all the evidence she desired. The judgment should be affirmed.

Dated, San Francisco, California,
August 2, 1950.

Respectfully submitted,

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